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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. TRACY SCOTT WEAVER, Petitioner.	2 CA-CR 2009-0245-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-59367

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Wanda K. Day — Tucson
Attorney for Petitioner

B R A M M E R, Judge.

¶1 Tracy Scott Weaver petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. He argues the trial court abused its discretion in concluding the

victim's post-trial recantation of portions of her trial testimony was not sufficiently credible to constitute newly discovered material facts entitling him to relief. Weaver suggests that at the very least he raised a colorable claim, entitling him to an evidentiary hearing. We grant review of Weaver's petition but deny relief.

Factual and Procedural Background

¶2 We review a trial court's ruling on a petition for post-conviction relief for an abuse of discretion, *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990), and "we give particular weight to the trial court's judgment in cases involving recanted testimony." *State v. Krum*, 183 Ariz. 288, 293, 930 P.2d 596, 601 (1995). In 1998, Weaver was convicted after a jury trial of one count of molestation of a child and three counts of sexual conduct with a minor under the age of fifteen. We affirmed his convictions and sentences on appeal. *State v. Weaver*, No. 2 CA-CR 98-0622 (memorandum decision filed June 22, 2000).

¶3 The victim, Weaver's daughter, T., was fifteen years of age at the time of trial. She testified that Weaver had been engaging in various sexual acts with her since she was at least four or five years old, first engaging in sexual intercourse with her when she was eleven years of age. With respect to count one, the child molestation charge, she testified that in 1990, Weaver had reached into the shower and touched her vagina. Weaver admitted that he had molested T. as alleged in count one. He conceded he had confessed to the police detective who questioned him that he had committed those acts and had admitted to his mother and step-father that he had engaged in other sexual conduct with T. With respect to the remaining three counts for sexual conduct with a

minor under the age of fifteen, T. had testified that (1) in December 1996, when T. was thirteen, Weaver had sexual intercourse with her on her step-sister's waterbed; (2) in June 1997, when T. was still thirteen, Weaver had engaged in sexual intercourse with her in the shower; and, (3) in October 1997, when T. was fourteen years old, Weaver had engaged in sexual intercourse with her on the couch.

¶4 In January 2005, Weaver filed a notice of post-conviction relief and in April 2009, he filed his petition for post-conviction relief, asserting he was entitled to relief based on a claim of "actual innocence," pursuant to Rule 32.1(h), and newly discovered evidence, under Rule 32.1(e). He also claimed trial counsel had been ineffective. In support of the petition, he attached to it a transcript of an interview of T. that had been conducted nearly five years earlier, in December 2004, by Weaver's former defense attorney, Howard Wine.[1] T. was twenty-one years old at the time of the interview, and had contacted Wine to recant some of her trial testimony. Weaver did not attach an affidavit from T. to his petition. Weaver attached only part of T.'s interview to his petition for post-conviction relief. We assume that, in the portion of the interview that was omitted, Wine had reviewed the first thirteen pages of T.'s direct trial testimony with her. In the portion of the transcript containing T.'s interview that is in the record, T. stated that Weaver's penis had only touched her once, when he had engaged in sexual intercourse with her when she was eleven years old.

[1]Between May, 2006 and April, 2009, Weaver's current counsel had requested, and was granted, extensions of time to file an amended petition for post conviction relief.

¶5 T. recanted her trial testimony that Weaver had engaged in sexual intercourse with her in the shower in June 1997. She could not remember why she had testified otherwise, but speculated, "I'm sure maybe that was just something that I was using as an excuse to leave [Weaver's residence]." She also recanted her prior testimony that Weaver had engaged in sexual intercourse with her on the couch in October 1997. T. clarified, "He never took off my clothes," he just "rubbed against me . . . for quite a while" and she felt him become "erect[]." In explaining why she testified otherwise at trial, T. stated:

> [A]t the time I didn't feel that [Weaver] could get convicted on charges unless they were sexual. I thought that he couldn't get convicted just for touching and rubbing . . . and I knew that what he had done was wrong. And I knew that . . . I needed to find a way to get [the charges] to actual[ly] stick.

¶6 T. also recanted her trial testimony about other instances of molestation. She had testified at trial that at least twice each week in 1990 Weaver would engage in sexual acts with her, including "rubbing on [her] vagina, [and] oral sex." As alleged in count one of the indictment, she testified Weaver would watch her when she showered and would "reach down and touch [her] vagina." Although, as we stated above, Weaver admitted at trial he had committed the act alleged in count one, T. recanted her testimony, calling "False" the description she had given of Weaver touching her genital area. She explained that she had thought people would "laugh at [her]" for thinking she was being molested if she said Weaver did not touch her genitals, even though when Weaver touched her "[she] felt that . . . he was getting aroused . . . [and] that it was wrong."

¶7 T. also testified at trial that Weaver had performed oral sex on her one night in the bedroom she shared with A. A. was the daughter of Weaver's live-in girlfriend, D. T. recanted this testimony during her interview with Wine. She explained that she was dating W. at the time, who was D.'s son and A.'s brother, and it was W. who had come into her bedroom that night. She gave numerous reasons for why she might have misstated the truth at trial about this incident. But she also explained, as she did consistently throughout the interview, that she had misstated the truth because "all [she] was looking for was for [Weaver] to get help." She emphasized repeatedly that she had "never realized the consequences or the actual time that [Weaver] was facing for each of the charges filed," and that she had thought he "might get a couple of years . . . and have to go to counseling." She "was afraid that a jury wouldn't convict him on lesser charges," that "[Weaver] wouldn't get charged with anything and that he would go on and not get help." She agreed with Wine that at the time of trial she felt "[she] had to lie just to have [Weaver] get a couple of years in counseling." T. said she contacted Wine to recant because she wanted to "have a good life" and "be happy," which she could not do if she allowed Weaver "to spend so many years in prison for . . . things that he didn't do."

¶8 The trial court had presided over Weaver's trial and therefore had heard T.'s original testimony. It found "no credible issue of actual innocence ha[d] been raised based on the interview" that had been attached to Weaver's petition for post-conviction relief. It noted that "[t]he state presented a strong case at trial and [T.] was a credible witness at that time." The court characterized T.'s recantation as "weak" and emphasized that a long period of time had elapsed between trial and T.'s "recantation." It summarily

dismissed Weaver's petition, concluding "[n]o issue of law or fact ha[d] been presented which would entitle [Weaver] to relief and no purpose would be served by further proceedings." This petition for review followed.

Discussion

¶9 Weaver argues the trial court abused its discretion in concluding T.'s post-trial recantation of evidence was not sufficiently credible to constitute newly discovered material facts and entitle him to relief, insisting he at least raised a colorable claim entitling him to an evidentiary hearing. *See* Ariz. R. Crim. P. 32.8; *State v. Spreitz*, 202 Ariz. 1, ¶ 5, 39 P.3d 525, 526 (2002) (defendant entitled to evidentiary hearing if "colorable claim is presented"). A colorable claim for relief is one that, "if defendant's allegations are true, might have changed the outcome." *Watton*, 164 Ariz. at 328, 793 P.2d at 85. One seeking relief based on newly discovered evidence must establish "newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e). Such facts exist if:

> (1) The newly discovered material facts were discovered after trial.
>
> (2) The defendant exercised due diligence in securing the newly discovered material facts.
>
> (3) The newly discovered facts are not merely cumulative or used solely for impeachment unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.

Id.

¶10 The recantation of evidence after trial may be "newly discovered material facts," entitling a petitioner to an evidentiary hearing, if the recantation is credible and probably would have changed the verdict. *See State v. Hickle*, 133 Ariz. 234, 238, 650 P.2d 1216, 1220 (1982). Recanted testimony, however, is considered "inherently unreliable," *id*., and "[c]ourts have long been skeptical of recanted testimony claims." *Krum*, 183 Ariz. at 294, 930 P.2d at 602. Thus, assessment of the "credibility of the recanted evidence is a controlling factor which can best be made in the court that heard the original testimony." *State v. Sims*, 99 Ariz. 302, 310, 409 P.2d 17, 22 (1965).

¶11 Giving "particular weight to the trial court's judgment," *Krum*, 183 Ariz. at 293, 930 P.2d at 601, we conclude the trial court did not abuse its discretion in finding T.'s recantation not credible and denying Murphy's petition for post-conviction relief. *Watton*, 164 Ariz. at 325, 793 P.2d at 82. As evidence of T.'s credibility, Weaver points out that T. recanted some instances of abuse but affirmed others. But, "clinical research suggests that child sexual abuse victims often falsely recant their accusations," *Krum*, 183 Ariz. at 294, 903 P.2d at 602, and the trial court was within its discretion to conclude that T.'s recantation was nonetheless "weak." As further evidence of T.'s credibility, Weaver notes that T.'s recantation "came several years after the trial when [T.] was no longer a child and easily influenced by the adults involved in her therapy, her life in general and in the prosecution of the case." The delay between trial and T.'s recantation, however, does not necessarily enhance T.'s credibility. Notably, the trial court treated the delay as a factor weighing against Weaver's petition. Similarly, T.'s age does not necessarily suggest her recantation was any more credible than her trial testimony. To the extent T.'s

trial testimony was influenced by others, defense counsel had elicited the suggestion of influence during cross examination. Counsel had emphasized that T. did not remember incidents of abuse, or remembered them with little specificity, when she spoke to detectives the year before, but that she clearly remembered those incidents of abuse at trial. The trial court nonetheless found T. to be a credible trial witness.

¶12 Again, Weaver did not provide an affidavit from T. in support of his petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.6; *State v. Wagstaff*, 161 Ariz. 66, 72, 775 P.2d 1130, 1136 (App. 1998). And Weaver only attached selected portions of the transcript of her interview. Without a complete transcript, the trial court was unable to assess fully T.'s reasons for giving that testimony. We are similarly handicapped in reviewing the trial court's order. Although portions of T.'s recantation were explained, others were not. Indeed, she recanted evidence Weaver had admitted. The trial court was in the best position to determine her credibility. Accordingly, we conclude the trial court did not abuse its discretion by finding T.'s recantation not credible.

¶13 T. also recanted her testimony that Weaver had touched her genitals in 1990, a charge Weaver had admitted both before and during trial. In addition, T. recanted her testimony that Weaver had engaged in sexual intercourse with her in the shower in June 1997. Unlike her recantation of other specific instances of molestation, however, she could not explain with certainty why she purportedly had misstated the truth at trial with regard to this incident. Finally, T. recanted her testimony that Weaver had sexual intercourse with her on the couch in October 1997. She clarified, however,

that Weaver had "rubbed against [her]" during that incident and she felt him become "erect[]." As the state correctly noted in the trial court, this conduct falls within the definition of "sexual intercourse," an element of sexual conduct with a minor. *See* A.R.S. §§ 13-1401(3) (definition); 13-1405 (sexual conduct with a minor). In its order denying post-conviction relief, the court found the state's case against Weaver had been strong. Thus, although the court found the recantation was not credible, it implicitly found that it would not have changed the outcome of the trial. Based on the record before us, we cannot say the trial court abused its discretion in denying relief on this claim. *See* Ariz. R. Crim. P. 32.1(e). Similarly, the claim is not colorable because, notwithstanding the recantation, the court found the outcome would have been no different; therefore, the court did not abuse its discretion by denying relief without first conducting an evidentiary hearing.

Disposition

¶14 For the foregoing reasons, although we grant Weaver's petition for review, we deny relief.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge